No. 46158-7-II

Court of Appeals, Div. II, of the State of Washington

Richard Frost,

Appellant,

v.

Fred Hacker and **John Hacker,**

Respondents.

Reply Brief of Appellant

Kevin Hochhalter
Attorney for Appellant
with
Don W. Taylor
Benjamin D. Cushman

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 43124

Table of Contents

Table of Authorities

Table of Cases

Statutes/Rules

1. Introduction

Hacker concedes that the original debt was unenforceable against Richard, Tammie, or their marital community. Where the marital community had no legal obligation to pay the debt and received no benefit from the new promise to pay, Tammie's personal feeling of moral obligation cannot serve to revive the debt against the marital community without Richard's consent. The superior court erred in entering judgment against the marital community on the 2013 promissory note. This Court should reverse the judgment against the marital community.

2. Argument

2.1 Hacker concedes that the marital community had no legal obligation to pay the original loan because the statute of limitations had expired.

The marital community was released of any obligation to pay the oral loan by the expiration of the statute of limitations. Hacker concedes this is true. Brief of Respondent at 4 ("In the instant case, the statute of limitations ran on the past debt.") As a result, the original debt was unenforceable against Richard, Tammie, or their marital community. None of them had any legal obligation to repay the debt.

2.2 Hacker's theory of "moral obligation" cannot bind the Frosts' marital community to Tammie's new promise to pay.

Hacker argues that a person's feeling of moral obligation to pay a debt that is legally unenforceable is sufficient to support a new promise to

pay the debt, such as Tammie's new promise to Hacker, embodied in the 2013 note. Hacker relies on *Orsborn v. Old Nat'l Bank of Wash.*, 10 Wn. App. 169, 516 P.2d 795 (1973), which states the general rule that a sense of moral obligation is not sufficient consideration to form an enforceable contract, except in the case of a new promise to pay a debt that has been rendered unenforceable by operation of law. While the *Orsborn* rule may apply to revive Tammie's personal obligation to pay the debt, it cannot bind the marital community.

2.2.1 The marital community cannot be bound by Tammie's personal feelings of moral obligation when the community had no legal obligation to pay the old debt.

One spouse's feelings of moral obligation do not create any obligation on the part of the marital community. *Munson v. Haye*, 29 Wn.2d 733, 738, 189 P.2d 464 (1948). In *Munson*, Mrs. Munson's coworkers and other third parties rendered services to her, which benefitted her marital community during a difficult illness. *Id.* at 735. There was no legal obligation to pay for the services, but Mrs. Munson felt a moral obligation. *Id.* at 738. Despite Mrs. Munson's personal feelings of moral obligation and despite the benefit previously received by the marital community, the court held that the marital community had *no legal or moral obligation to pay. Id.* Mrs. Munson's unilateral decision to satisfy her moral obligation by pledging community property "was such a gift as neither member of the community could make without the consent of the other." *Id.*

Even *Orsborn*, on which Hacker relies, supports this result. The issue in *Orsborn* was whether the personal representative of an estate could revive an unenforceable debt of the decedent through her own new promise to pay. The court held that the new promise of the personal representative did not bind the estate. *Id.* at 174. The personal representative represented the *estate,* not the deceased. *Id.* More importantly, the estate had no legal obligation to pay the unenforceable debt. *Id.* at 173. Neither did the estate receive any benefit from the new promise. *Id.* Any moral obligation felt by the personal representative was insufficient to bind the estate to the new promise.

A marital community, like an estate, is a legal construct, not a person. While not recognized as a separate legal entity, the marital community "is essentially a business concern." *In re Marriage of Schweitzer,* 132 Wn.2d 318, 331, 937 P.2d 1062 (1997). It cannot feel a moral obligation. Like the estate in *Orsborn*, the Frosts' marital community has only legal obligations, not moral ones. The marital community had no legal obligation to pay the old debt. Tammie's personal moral obligation is insufficient to bind the marital community to the new promise.

Similarly, in *Schweitzer* and *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 701 P.2d 1114 (1985), one spouse's feelings of moral obligation could not bind the martial community to a debt for which it had no legal obligation to pay and for which it received no benefit. Mrs. Schweitzer felt a moral obligation to support her son's schooling. *See Schweitzer*, 132 Wn.2d at 330-32. The debt she incurred in satisfaction of her moral obligation could not bind the marital community without her spouse's consent. *Id.*

Mr. McCool felt a moral obligation to support his son's business. *See McCool*, 104 Wn.2d at 80. The guaranty he executed in satisfaction of his moral obligation was not legally binding on the marital community because his spouse did not consent. *Id.* at 86. Similarly, the promissory note Tammie signed in satisfaction of her personal moral obligation is not legally binding on the marital community because Richard did not consent.

2.2.2 The marital community cannot be bound by Tammie's personal feelings of moral obligation when her new promise to pay conferred no benefit on the community.

Hacker argues that Tammie could bind the community because she was acting for its benefit. Brief of Respondent at 7 (quoting *In re Marriage of Chumbley*, 150 Wn.2d 1, 74 P.3d 129 (2003)). However, Hacker looks to the wrong benefit. As illustrated in *Orsborn*, it is the *new promise,* not the original debt, that must confer a benefit. *Orsborn*, 10 Wn. App. at 173. Certainly the Orsborn estate benefitted from the original loan to the deaceased: without such a loan during the decedent's life, the estate would necessarily have been smaller. But the *Orsborn* court correctly looked to the *new promise,* not the original debt, for some benefit to the estate. Finding no benefit from the new promise, the court held that the new promise was not binding on the estate.

Similarly, the question here is not whether the original debt benefitted the Frosts' marital community, but whether *Tammie's new promise* benefitted the community. "[A] disposition of community funds is within the scope of a spouse's authority to act alone *only* if he or she acts 'in the community interest.'" *Chumbley*, 150 Wn.2d at 9 (emphasis added). The question for this

Court is whether the disposition at issue—the 2013 note—was made "in the community interest." It was not.

Richard does not dispute that the original debt benefitted the community by allowing the Frosts to purchase real estate. However, this *past* benefit, from a *past* act, is not relevant to the question of whether Tammie's new promise is binding on the community without Richard's consent. The relevant benefit must flow directly from the act at issue—Tammie's new promise, the 2013 note. The 2013 note did not confer any benefit on the marital community.

Tammie's new promise was not in the community interest. The community had no obligation to pay Hacker. The 2013 note, if binding on the community, waives the community's statute of limitations defense and depletes the community property by over $35,000 plus any interest that may accrue. The community did not receive anything in exchange for this waiver and waste of funds. Because the 2013 note would deplete community funds with no offsetting benefit, it was not in the community interest.

Because the 2013 note was not in the community interest, it was outside the scope of Tammie's authority to bind the marital community. The community had no obligation to pay the old debt and received no benefit from the new promise. Thus, the 2013 note was an impermissible gift of community credit. *See* RCW 26.16.030(2); *Schweitzer,* 132 Wn.2d at 331; *McCool*, 104 Wn.2d at 81. Richard did not consent. The marital community cannot be held liable. This Court should reverse the judgment against the marital community.

2.3 The marital community is not estopped to deny liability on the 2013 note.

Hacker argues, in passing, that "Richard Frost is estopped to disaffirm the promissory note." Brief of Respondent at 10. However, Hacker does not state the requirements for estoppel or point to any evidence that would support this argument. A marital community is estopped to deny liability "when one spouse permits the other to conduct the transaction, both have a general knowledge of the transactions and both are ready to accept the benefits which may come from it." *Reid v. Cramer*, 24 Wn. App. 742, 747, 603 P.2d 851 (1979). There is no evidence that Richard permitted Tammie to revive old debts, had any knowledge of her new promise, or was ready to accept any benefits from the new promise. *See, e.g.,* CP at 29. Neither Richard nor the community is estopped. As demonstrated above, the 2013 note is not a community obligation. This Court should reverse the judgment against the marital community.

2.4 The Court should deny Hacker's request for attorney fees and costs.

Under RAP 18.1(b), a party requesting fees must devote a section of its brief to the request for fees. Argument and citation to authority are required. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, L.L.C.*, 138 Wn. App. 443, 462, 158 P.3d 1183 (2007). Hacker makes his bare request in the last sentence of his brief, without any argument or citation to authority. The 2013 note has no attorney fee provision. CP at 22. Even if Hacker prevails, the Court should deny his request.

3. Conclusion

Tammie's feelings of moral obligation could not bind the marital community to her new promise to pay, embodied in the 2013 note, without Richard's consent. The community had no legal obligation to pay and received no benefit from the new promise. This Court should reverse the judgment against the marital community and grant Richard's motion for summary judgment dismissal of Hacker's claims against Richard and the marital community.

Respectfully submitted this 25th day of September, 2014.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 25, 2014, I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402	____ U.S. Mail, Postage Prepaid ____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail
copy:	Jennifer M. Modak Thomas A. Miller Miller Law Office. P.S. 2620 R W Johnson Blvd. SW Suite 212 Tumwater, WA 98512 jmm@tfmillerlaw.com tfm@tfmillerlaw.com	____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail
copy:	Tammie Frost P. O. Box 571 Rainier, WA 98576	_XX_ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile _____ Electronic Mail

DATED this 25th day of September, 2014.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

CUSHMAN LAW OFFICES PS

September 25, 2014 - 11:01 AM

Transmittal Letter

Document Uploaded: 461587-Reply Brief.pdf

Case Name: Frost v. Hacker
Court of Appeals Case Number: 46158-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Rhonda Davidson - Email: rdavidson@cushmanlaw.com